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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 252

RIN 0750-AI04

Defense Federal Acquisition Regulation Supplement: Allowability of Legal Costs for Whistleblower Proceedings (DFARS Case 2013-D022)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2013 that addresses the allowability of legal costs incurred by a contractor related to whistleblower proceedings.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register on September 30, 2013 (78 FR 59859). This interim rule revised DFARS subparts 216.3 and added a new clause at 252.216-7009 to implement paragraphs (g) and (i) of section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

II. Discussion and Analysis

No public comments were received in response to the interim rule. The interim rule is converted to a final rule without change.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because most contracts awarded to small entities are awarded on a competitive fixed-price basis, and do not require application of the cost principles contained in this rule. However, a final regulatory flexibility analysis has been performed and is summarized as follows:

The reason for the action is to implement section 827(g) of the National Defense Authorization Act for Fiscal Year (FY) 2013 (Pub. L. 113-239). Section 827(g) expands the cost principle at 10 U.S.C. 2324(k) to apply the cost principle on allowability of costs related to legal and other proceedings to costs incurred by contractors in proceedings commenced by a contractor employee submitting a complaint under 10 U.S.C. 2409 (whistleblowing), and include as specifically unallowable, legal costs of a proceeding that results in an order to take corrective action under 10 U.S.C. 2409.

The objective of the rule is to enhance whistleblower protections for contractor employees. The legal basis for the rule is 10 U.S.C. 2324(k).

There were no public comments in response to the initial regulatory flexibility analysis.

Most contracts awarded on a fixed-price competitive basis do not require application of the cost principles. Most contracts valued at or below the simplified acquisition threshold are awarded on a fixed-price competitive basis. Requiring submission of certified cost or pricing data for acquisitions that do not exceed the simplified acquisition threshold is prohibited (FAR 15.403-4(a)(2)). According to Federal Procurement Data System data for FY 2012, there were 48,115 new DoD contract awards over the simplified acquisition threshold in FY 2012. Of those contracts, only 6,760 awards were to small businesses on other than a competitive fixed-price basis. Estimating 3 awards per small business, that could involve about 2,600 small businesses. However, this rule would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409, and if that proceeding resulted in any of the circumstances listed at FAR 31.205-47(b). DoD does not have data on the percentage of contracts that involve submission of a whistleblower complaint and result in any of the circumstances listed at FAR 31.205-47(b).

There are no projected reporting, recordkeeping, and other compliance requirements of the rule.

DoD was unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements of the statute.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 216 and 252

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 216 and 252, which was published at 78 FR 59859 on September 30, 2013, is adopted as a final rule without change.

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